83-6184

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CHANDLER R. MULLER
Muller, Kirkconnell and
Lindsey, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (305) 645-3000

Attorney for the Petitioner.

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Petitioner, FREDDIE LEE WILLIAMS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Florida entered in these proceedings on June 23, 1983, rehearing denied September 29, 1983.

OPINIONS BELOW

The Opinion of the Florida Supreme Court on the direct appeal of the Petitioner's conviction and sentence of death is reported as Williams v. State of Florida, 437 So.2d 133 (Fla. 1983), and is attached as Appendix A.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on June 23, 1983. A timely Motion for Rehearing was denied on September 29, 1983, as is reflected in the published opinion in the Southern Reporter attached as Appendix A. Williams v. State of Florida, 437 So.2d 133 (Fla. 1983). Petitioner's application for extension of time with which to file a Petition for Writ of Certiorari was granted on November 21, 1983, by the Honorable Lewis F.

Powell, Associate Justice, extending the time for the filing of the Petition for Writ of Certiorari in the instant case to and including December 28, 1983. This court's jurisdiction is invoked under 28 U.S.C. 1257(3), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the Florida Supreme Court to consider non-statutory but judicially recognized mitigating circumstances when conducting a proportionality review of the applicability of a death sentence constitutes excessive and disproportion of punishment forbidden by the Eighth and Fourteenth Amendments, and constitutes an equal protection violation under the Fourteenth Amendment.

2. Whether the Florida Supreme Court failed to perform a constitutionally adequate proportionality review since Petitioner's case was factually inapposite from several other Florida Supreme Court cases where it was held that the death penalty would constitute excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

3. Whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and his prior conviction as two (2) separate aggravating circumstances constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted . . .

And the Fourteenth Amendment to the Constitution of the

United States which provides, in pertinent part:

> [Nor] shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the statutes of the State of Florida which are applicable to this Petition. Fla. Stat. Ann. 782.04(1)(a) (1979) which provides:

> 782.04 Murder - (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

and 921.141 (1979) which provides:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence -
> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigation circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5).

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any reobbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for

pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES - Mitigating circumtances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The question of the failure of the Florida Supreme Court to consider non-statutory mitigating circumstances when conducting its proportionality review as constituting excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments was raised at the trial court level during the advisory sentencing proceeding, specifically in Petitioner's Brief on Appeal to the Florida Supreme Court, and generally in the dissenting opinion of Mr. Justice Overton in the Florida Supreme Court opinion (Appendix A). The failure of the Florida Supreme Court to consider the non-statutory but judicially recognized mitigating circumstances that Petitioner had two (2) children he cared for and that a domestic relationship existed between the Petitioner and the victim prior to the murder as violating the Defendant's equal protection rights was raised during the advisory sentencing proceeding in the trial court, generally throughout Petitioner's Brief to the

Florida Supreme Court, and implicitly in Mr. Justice Overton's dissenting opinion (Appendix A).

2. The failure of the Florida Supreme Court to perform a constitutionally adequate proportionality review of Petitioner's case as compared to several other Florida Supreme Court cases wherein it was held that the death penalty would be constitutionally inappropriate was raised during the advisory sentencing proceedings in the trial court, specifically in Petitioner's Brief on Appeal to the Florida Supreme Court, and explicitly and expressly in the dissenting opinion of Justice Overton (Appendix A).

3. The question of whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and one of his prior convictions which was the reason he was in that parole status as two (2) separate aggravating circumstances as an improper doubling of aggravating circumstances was raised expressly during the advisory sentencing proceeding, and in Petitioner's Brief on Appeal to the Florida Supreme Court.

STATEMENT OF THE CASE

A. The Facts

Petitioner, a black, and the victim, Mary Robinson [Mary], had lived together as boyfriend-girlfriend for eighteen (18) years prior to her killing (R-227-230).[1] On the night of the murder, the victim went to her sister's house and there received three (3) upsetting telephone calls from Petitioner. After these calls, the victim and her sister went to Jai-Alai and returned to the apartment of the Petitioner and victim around 11:00 in the evening. The sister left and Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were

[1] In this Petition, "R" is a reference to the appropriate page number in the Record on Appeal in the trial court.

already present and the victim was dead. The victim's sister described Williams as screaming when she arrived at the apartment (R-231-239). A test of the victim's blood by the medical examiner indicated she had .155 milligrams of alcohol, indicating she was "under the influence" at the time of the shooting (R-513). Petitioner had also been drinking.

Earlier that evening, Petitioner had borrowed a neighbor's hand gun, telling the neighbor that he was going gambling. Petitioner had borrowed the gun from the neighbor on at least three (3) prior occasions (R-244-259). Petitioner testified that he left the gun on the dresser in the bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. Petitioner himself called the police and an ambulance. Petitioner also testified that he did not want the police to find a weapon in his possession since he was on parole. He testified that he borrowed the gun from his neighbor, but did not take it from the apartment until after Mary had gone to Jai-Alai. He went several places that night, including to his mother's residence where he saw a friend named Rosa Lee Jones. Petitioner was not arrested for the murder until three (3) days later. Petitioner denied that he was the one who had shot Mary (R-630-667). There were no eyewitnesses to the shooting.

As the Florida Supreme Court stated in its opinion, the State's case revolved around long-standing domestic arguments between Williams and the victim and in particular, Williams' anger over the victim supposedly taking a shower that night, a sign that he took to mean that the victim was cleaning up after being with another man (Appendix A).

B. Trial Proceedings

Petitioner was arrested for First Degree Murder on November 10, 1980, three (3) days after the date of the offense (R-1072-1074). A preliminary hearing was conducted,

probable cause was found, and Petitioner was held to answer the charges on November 26, 1980 (R-1078-1080). Williams was indicted on January 29, 1981, for First Degree Murder (R-1084). A written plea of not guilty and a Notice of Appearance was filed by private counsel on December 3, 1980 (R-1083). On March 23, 1981, said private counsel was allowed to withdraw (R-1134) and on April 1, 1981, the Public Defender appeared for Petitioner (R-1170).

Trial by jury was conducted on October 12 through October 16, 1981 (R-1-746) with a finding of guilty as charged by the jury (R-739-740; 1332). The advisory phase of the trial was conducted on October 20, 1981 (R-758-848). During said advisory phase, the jury recommended the death sentence by a vote of 8 jurors recommending the death sentence and 4 recommending life imprisonment (R-843-845).

Edward Mullis, the lead investigator in the case, testified that he conducted a gunshot residue test on the Petitioner when arriving at the apartment to attempt to determine if the Petitioner had fired a weapon (R-489). However, the test was inconclusive (R-616).

During the advisory phase of the trial, the Petitioner merely introduced documents showing Petitioner's two (2) prior convictions (R-779-782). Petitioner stipulated that he was on parole at the time of the offense as a result of one of the two (2) convictions admitted into evidence (R-779-782). Petitioner produced the following testimony:

Virginia Wilson - She has known Petitioner all of his life and knows him to be a person who loves and helps people (R-783-784).

Rosabelle Thompson - She has known Petitioner about 16 years and he has always been kind to her and he cares about people (R-785-786).

Gladys Forsyth - She knew Williams 15 years and he thought of her as a mother. He treated her nice and he took

care of his own two (2) children (R-788-789).

Wilbur Johnson - This witness was Petitioner's employer. Petitioner was a good worker who never posed any problems (R-790-791).

Gussie Lee Williams - This is Petitioner's mother. Williams was born in Alabama and Petitioner's father died when Williams was very young. She and her daughter raised him "the best way I can," the witness having had no education. Petitioner has two (2) sons whom Petitioner raised along with his mother (R-792-794).

Gary Lee Williams - This high school student is the son of Petitioner. Williams is a "good father," who worked and supported this witness (R-795-797).

Mary Lee Williams - Petitioner is the brother of this witness. Their father died when she was eight (8) and when Williams was seven (7) years of age (R-797-799).

Freddie Lee Williams - Petitioner - His father died when Petitioner was of tender age, leaving five (5) children. Williams had three (3) brothers whom he helped raise. He left school in the ninth grade to help support the family. He has done construction work, installation of cables and fruit picking (R-800-802). Petitioner is black.

Petitioner was sentenced to death on December 18, 1981, after an eight-to-four (8-4) vote by the advisory jury for the death penalty. The trial judge found two (2) aggravating circumstances under Florida Statute §941.41 (5):

> (a) The capital felony was committed by a person under sentence of imprisonment (because he was on parole at the time).
>
> (b) The defendant was previously convicted of another capital felony involving the use or threat of violence to a person (one of the two convictions relied on for this aggravating circumstance was the reason he was on parole at the time. (R-1368-1372)

Despite the fact that evidence at trial disclosed a long-standing domestic relationship between the Petitioner and the victim, the fact that Petitioner had two (2) minor children he was raising, the fact the Petitioner made no

effort to flee, and the testimony of Petitioner's character witnesses, the trial court did not acknowledge those factors as being judicially-recognized non-statutory mitigating circumstances (R-1371) which could offset the aggravating circumstances. Petitioner was sentenced to death on December 18, 1981 (R-849-862).

C. The Direct Appeal

The Florida Supreme Court unanimously affirmed Petitioner's conviction, and by a vote of five-to-one (5-1), affirmed Petitioner's death sentence (Appendix A).

The court rejected Petitioner's proportionality arguments, as well as Petitioner's argument that the trial court erred by doubling the aggravating circumstances.

Mr. Justice Overton concurred with the conviction but dissented in the imposition of the death sentence stating:

> In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five (25) years. I disagree with the majority opinion that this case is factually inapposite from Blair v. State, 406 So.2d 1103 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); and Tedder v. State, 322 So.2d 908 (Fla. 1975).

REASONS FOR GRANTING THE WRIT

ONE

THE TRIAL COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE FLORIDA SUPREME COURT TO CONSIDER NON-STATUTORY BUT JUDICIALLY-RECOGNIZED MITIGATING CIRCUMSTANCES WHEN CONDUCTING A PROPORTIONALITY REVIEW WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The United States Supreme Court has mandated proportionality review of a death penalty sentence whether provided by statute, Gregg v. Georgia, 428 U.S. 153 (1976), or by case law, Proffitt v. Florida, 428 U.S. 242 (1976). The Supreme Court has discussed proportionality concerning the death penalty in at least two ways. First, in several

instances, the court has examined whether the death penalty was proportionate to the crime for which it was imposed, i.e., Coker v. Georgia, 433 U.S. 584 (1977) (sentence of death grossly disproportionate to crime of rape when no life taken) (plurality opinion). Second, the court has examined whether the penalty in the case was proportionate to other sentences imposed for similar crimes. Gregg v. Georgia, supra. This latter proportionality review, intended to prevent the arbitrary and capricious application of the death penalty, is the crux of Petitioner's argument herein.

The Florida Supreme Court on several occasions has expressly stated that non-statutory mitigating circumstances should be considered when making a decision whether or not the death penalty is constitutionally appropriate. Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied 441 U.S. 956 (1979); Herzog v. State, ___ So.2d ____ 1973 (1983 F.L.W. 383, Fla., Sept. 22, 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

During the advisory sentencing proceeding in the Petitioner's case, evidence was disclosed that Petitioner had two (2) minor sons whom he helped support. This was urged at the trial court level and by Petitioner before the Florida Supreme Court as a non-statutory mitigating circumstance. Additionally, the evidence at trial and during the advisory sentencing proceeding was that Petitioner and the victim had lived together on and off for eighteen (18) years in a domestic relationship. Further, the evidence showed that Williams did not flee after the killing. Character witnesses also testified on Williams' behalf. These factors were also urged at the trial court and Florida Supreme Court levels as a non-statutory but judicially-recognized mitigating circumstance. Nevertheless, the trial court improperly rejected these judicially-recognized non-statutory mitigating circumstances in imposing the death penalty (R-1370-1372).

The Florida Supreme Court has expressly recognized that the fact that a person has minor children is a non-statutory mitigating circumstance. In Jacobs v. State, 396 So.2d 713 (Fla. 1981), involving a female sentenced to death, the court stated:

> The trial judge held the mistaken belief that he could not consider non-statutory mitigating circumstances . . . The jurors in this case may have considered that fact that Ms. Jacobs [the Defendant] was the mother of two children for whom she cared . . . 396 So.2d 713 at 718.

The Supreme Court in Jacobs v. State, supra, reversed the trial court's imposition of the death penalty in part based on the non-statutory mitigating circumstance that the defendant was the mother of two (2) children for whom she cared. It was undisputed that the Petitioner herein was the father of two (2) minor children for whom he cared and helped support and yet this was not accorded status as a non-statutory minimum circumstance in this case notwithstanding that it was in Jacobs v. State, supra.

Furthermore, the fact that a domestic relationship exists between the defendant and the victim has also been expressly recognized as a non-statutory mitigating circumstance. For example, in Herzog v. State, supra, the Florida Supreme Court recently stated:

> The trial court properly found that no statutory mitigating circumstances existed; however, there is no indication in the sentencing order that the court considered non-statutory mitigating circumstances. We find evidence in the record that the jury could have considered in finding non-statutory circumstances (e.g. . . . the domestic relationship that existed [between the defendant and the victim] prior to the murder . . .). 1983 F.L.W. 383 at 386.

It is important to note that on three (3) separate occasions the Florida Supreme Court has reduced to life sentences, as opposed to merely remanding for resentencing, cases in which the jury recommended death and each of those cases involved a domestic dispute. See Halliwell v. State, supra; Kampff v. State, supra; and Blair v. State, supra. See also, Godfrey v. Georgia, 446 U.S. 420 (1980).

That the Petitioner voluntarily surrendered is also a non-statutory mitigating circumstance, Washington v. State, 362 So.2d 658 (Fla. 1978), as is evidence concerning good character of a defendant, Peek v. State, 395 So.2d 492 (Fla. 1980); Jacobs v. State, supra. However, both the trial court and the Florida Supreme Court dismissed these applicable circumstances without explanation.

The Florida Supreme Court acted arbitrarily and capriciously in refusing to apply the above-described four (4) non-statutory but judicially-recognized mitigating circumstances to Petitioner when the court had applied those circumstances to other death row appellants. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Personnel Administration of Massachusetts v. Feeny, 442 U.S. 256 (1979). For example, this is especially evident when comparing Petitioner's situation with that of the female defendant in Jacobs v. State, supra, whose death sentence was reversed in part based on the judicially-recognized non-statutory mitigating circumstance that she had two (2) children she cared for (Petitioner herein has two (2) children he cared for). This constitutional error by the Florida Supreme Court is more pronounced by the fact that the only two statutory aggravating circumstances presented by Respondent did not relate to the commission of the offense itself but were rather based solely on Petitioner's status (a convicted felon on parole) at the time of the offense.

Both the trial court and the Florida Supreme Court arbitrarily and capriciously refused to consider the four (4) non-statutory but judicially-recognized mitigating circumstances described above in imposing the death penalty on the Petitioner. A violation of Petitioner's equal protection rights and right to be free from disproportionate punishment were violated when those four (4) non-statutory

mitigating circumstances were not considered in Petitioner's case but were considered and recognized in other Florida Supreme Court cases as justification for reversing trial court-imposed death sentences. Thus, the Petitioner's sentence of death cannot be upheld and the Florida Supreme Court was in error in affirming it.

TWO

WHETHER THE FLORIDA SUPREME COURT FAILED TO PERFORM A CONSTITUTIONALLY ADEQUATE PROPORTIONALITY REVIEW SINCE PETITIONER'S CASE WAS FACTUALLY INAPPOSITE FROM SEVERAL OTHER FLORIDA SUPREME COURT CASES WHEREIN IT WAS HELD THAT THE DEATH PENALTY CONSTITUTED EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS

An unbroken line of cases since Furman v. Georgia, 408 U.S. 238 (1972) requires any state wishing to impose a capital sentence to channel the sentencers' discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980). Special capital sentencing requirements derive from the court's recognition that there is a siginficant constitutional difference between the infliction of the death penalty and lesser punishments. Beck v. Alabama, 447 U.S. 325 (1980). This qualitative difference calls for a greater degree of reliability when the sentence of death is imposed. Lockett v. Ohio, 437 U.S. 586 (1978).

The Florida Supreme Court has stated that in evaluating whether or not a death sentence is appropriate, that the court should consider the factual situation of the murder before it in comparison with the factual situations involving other murders wherein the death penalty was not found to be appropriate. In State v. Dixon, 283 So.2d 1 (Fla. 1973), the court stated:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating

> circumstances and Y numbers of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . If a defendant is sentenced to die, the court can review that case in light of the other decisions and determine whether or not the punishment is too great. 283 So.2d 1 at 10.

The Florida Supreme Court has recognized that it has the "responsibility to determine independently" if death is appropriate. Songer v. State, supra. See also Douglas v. State, 328 So.2d 18 (Fla. 1976). As stated in Harvard v. State, 375 So.2d 833, 834 (Fla. 1977), it is the duty of the Florida Supreme Court to "evaluate anew" the circumstances.

However, as can be seen by the sentencing order and the Florida Supreme Court's opinion in this case, it failed to follow its own proportionality guidelines which clearly would have resulted in the reduction of Petitioner's penalty from death to life imprisonment. The Florida Supreme Court ignored its own set proportionality review procedures and followed the procedure that was condemned in State v. Dixon, supra, by participating in a counting process of adding "X number of [statutory] aggravating circumstances and Y number of [statutory] mitigating circumstances . . ." rather than factually comparing Petitioner's offense with other murders where the death penalty was found to be constitutionally impermissible.

A two-part test was set forth in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The Florida Supreme Court's first function is to determine if the trial judge properly applied the procedures of Florida Statute §921.141. If the Florida Supreme Court determines the lower court was correct, then a "proportionality" determination must be made. In other words, the court must decide, as stated in State v. Dixon, supra, how the case compares factually with other cases.

In the instant case, Mr. Justice Overton concurred in Petitioner's conviction but dissented from the imposition

of the death sentence stating:

> I concur with the conviction. I dissent from the imposition of the death sentence. In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five years. I disagree with the majority opinion that this case is factually inapposite from Blair v. State, 406 So.2d 1103 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); and Tedder v. State, 322 So.2d 908 (Fla. 1975). Those cases must be used to properly evaluate the proportionality of the death sentence in this case.

Mr. Justice Overton, dissenting, correctly applied the proportionality test in Petitioner's case and properly found the death penalty constitutionally inapplicable in Petitioner's case. In the following cases, the Florida Supreme Court reversed a court-imposed death sentence and entered a sentence of life imprisonment under circumstances much more serious than those in the instant case.

Tedder v. State, 322 So.2d 908 (Fla. 1975) - in this case, the defendant fired a shot at his wife, child and mother-in-law. They fled into a trailer and defendant pursued. While inside, the defendant killed his mother-in-law with a gun. He then would not let his wife come to her aid. The lower court found three aggravating circumstances including that the crime was heinous. The Florida Supreme Court found that it was not heinous, found no mitigating circumstances, but reduced Tedder's death sentence to life imprisonment.

Chambers v. State, 339 So.2d 204 (Fla. 1976) - the defendant and victim had been living together. An argument arose which resulted in defendant beating her all over her head and legs. She died of cerebral and brain stemmed contusion. She was beaten so badly her face was unrecognizable. The lower court found the crime to be heinous and found no mitigating circumstances. The Florida Supreme Court found that the "totality of the circumstances"

did not warrant the death sentence and reduced the sentence to life.

McCaskill v. State, 344 So.2d 1276 (Fla. 1977) - this was a robbery-murder, with the murder caused by a gunshot blast from inside the getaway vehicle carrying three co-defendants. It is unknown who fired the blast. The trial court found that the crime created risks to a great number of people, and that it was committed during a robbery. The Florida Supreme Court determined that a life sentence, not death, was appropriate, relying largely on comparisons with other similar cases.

Brown v. State, 367 So.2d 616 (Fla. 1979) - the defendant, along with two others, abducted the victim for the purpose of stealing his car. They drove the victim to a lake, forced him into it, struck him with fists and boards and shot him. As they started to leave, the victim climbed out of the lake, so the three returned and a co-defendant held him under water until he died. The trial judge found that the crime was heinous and was done during a robbery and kidnapping. No mitigating circumstances were found. Without rejecting the lower court's findings, the Florida Supreme Court reversed the trial court's imposition of the death penalty based on "our precedents."

Phippen v. State, 389 So.2d 991 (Fla. 1980) - the defendant told someone that he was going to kill his mother and stepfather, which he subsequently did with four shots to the former and six to the latter. The trial court found that the murder was done for pecuniary gain and that it was heinous. The Florida Supreme Court found there was no proof of the pecuniary gain factor and held that the facts did not compel a death sentence, reversing the trial court's imposition of same.

It is unquestionable that in applying the proportionality test, the instant case is far less aggravated than those cases cited above, thus mandating a reduction of

sentence to one of life imprisonment. Furthermore, three of the above cases (Tedder, Chambers, Phippen) involved domestic disputes, as does the case before this court. Finally, on three occasions, the Florida Supreme Court has reduced to life sentences cases in which the jury recommended death and each of those cases involved a domestic dispute. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Kampff v. State, 371 So.2d 1007 (Fla. 1979); and Blair v. State, 406 So.2d 1103 (Fla. 1981).

A review of the facts of Petitioner's case as compared with the above cases demonstrates conclusively that imposition of the death sentence for this crime would constitute cruel and unusual punishment. This was a domestic dispute over the existence of a supposed lover. It was not committed for pecuniary gain, during the commission of any enumerated felonies, was not heinous, was not to cover up the commission of another crime, and the Petitioner did not flee after the commission of same. Arguably, the evidence does not even support a conviction for First Degree Murder or murder at all since it was a circumstantial evidence case and Petitioner denied he was the one who committed the offense. The sole aggravating factors related to the status of the Petitioner at the time of the offense and not to the circumstances of the event itself.

Under any proportionality review, aggravating circumstances surrounding the commission of the offense itself (i.e., for pecuniary gain; during a kidnapping or robbery; to cover up a crime) should weigh far more heavily than circumstances surrounding the status of the Petitioner at the time.

The Florida Supreme Court set up a procedure for proportionality review of death-sentence cases but unconstitutionally failed to follow its procedure in the Petitioner's case. This failure to follow a constitutionally-adequate proportionality review has

resulted in the imposition of the death penalty. Without relief from this court, the Florida Supreme Court's duty to perform a constitutionally-adequate proportionality review would result in excessive and disproportionate punishment being imposed upon Petitioner in violation of the Eighth and Fourteenth Amendments.

THREE

WHETHER THE FLORIDA SUPREME COURT, BY CONSIDERING THE PETITIONER'S PAROLE STATUS AT THE TIME OF THE OFFENSE AND HIS PRIOR CONVICTION AS TWO SEPARATE AGGRAVATING CIRCUMSTANCES CONSTITUTES AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES RESULTING IN EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS

It is well settled that when one act constitutes a violation of two of the enumerated aggravating circumstances in Florida Statute §921.141(5) (1979), only one aggravation can be counted in the sentence determination process. Province v. State, 337 So.2d 783 (Fla. 1976); Armstrong v. State, 399 So.2d 953 (Fla. 1981). Each of the Florida cases described thus far deals with the circumstances of subsection (d) of the above statute [that the murder was committed in the course of another enumerated felony] and subsection (f) [that the crime was committed for pecuniary gain] or with subsections (e) and (g) [avoiding arrest and hindering law enforcement]. See for example, Province v. State, supra, and Welty v. State, 402 So.2d 1159 (Fla. 1981).

In the instant case, the trial court and Florida Supreme Court found that Petitioner violated subsection (b) of the statute by having been convicted of two aggravated assaults in Case Numbers CR71-1551 and CR74-3442. The court also found a violation of subsection (a) of the statute which also involved Case Number CR74-3442, which resulted in Petitioner being on parole at the time of the offense. Clearly, the fact that Petitioner was legally on parole at the time of the offense does not ipso facto mean that he was under a sentence of imprisonment. The Florida Supreme

Court, by considering the Petitioner's parole status at the time of the offense and his prior conviction as two separate aggravating circumstances, constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For each of the foregoing reasons, the Petitioner, FREDDIE LEE WILLIAMS, respectfully submits that the court should grant the Petition for Writ of Certiorari and enter an order vacating the Florida Supreme Court judgment below approving the imposition of the death penalty.

Dated: Winter Park, Florida
December 27, 1983

Respectfully submitted,

CHANDLER R. MULLER
Muller, Kirkconnell and
Lindsey, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (305) 645-3000

Attorney for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the bar of this court and that I served the Petition for a Writ of Certiorari to the Supreme Court of Florida on Respondent by placing three (3) copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Jim Smith, Attorney General
The Capitol
Suite 1502
Tallahassee, Florida 32301

Office of the Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32018

All parties required to be served have been served.

Done this 27th day of December, 1983.

IRBY G. PUGH, Esquire
218 Annie Street
Orlando, Florida 32806
Telephone: (305) 843-5840

Attorney for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

APPENDIX

Freddie Lee WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 61549.

Supreme Court of Florida.

June 23, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted in the Circuit Court, Orange County, Thomas E. Kirkland, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) evidence was sufficient to find premeditation beyond reasonable doubt and to sustain conviction; (2) trial court did not err in refusing to give circumstantial evidence instruction in addition to standard jury instructions on reasonable doubt and burden of proof; (3) death sentence was not comparatively inappropriate; and (4) trial court properly determined existence of two distinct aggravating circumstances to warrant imposition of death sentence.

Affirmed.

Overton, J., concurred in part, dissented in part, and filed opinion.

1. Criminal Law ⇐1134(1)

Function of the Supreme Court in reviewing capital cases is to see if there is substantial, competent evidence to support the verdict.

2. Homicide ⇐232

Evidence was sufficient to find premeditation beyond reasonable doubt and to sustain first-degree murder conviction.

3. Homicide ⇐253(2)

Though evidence was circumstantial, it was nonetheless sufficient to sustain first-degree murder conviction, in absence of presentation by defendant of any reasonable hypothesis of innocence.

4. Criminal Law ⇐784(4)

Standard jury instructions on reasonable doubt and burden of proof were adequate to instruct jury on circumstantial evidence, and the trial court did not abuse its discretion in refusing to give "old" circumstantial evidence instruction in addition to standard jury instructions.

5. Criminal Law ⇐1134(1)

In reviewing death sentence, the Supreme Court has duty to make proportionality determination and decide how case compares with other cases.

6. Homicide ⇐354

Death sentence imposed for first-degree murder was not comparatively inappropriate. U.S.C.A. Const.Amend. 8.

7. Homicide ⇐354

Defendant, who was on parole at time of subject homicide, was "under sentence of imprisonment," for purposes of aggravating circumstances; actual incarceration was not necessary. West's F.S.A. 921.141(5)(a, b).

8. Homicide ⇐354

Trial court properly determined existence of two aggravating circumstances to justify imposition of death sentence for first-degree murder, contrary to defendant's assertion that the trial court had improperly doubled the aggravating circumstances. West's F.S.A. 921.141(5)(a, b).

Charles A. Tabscott, Orlando, for appellant.

Jim Smith, Atty. Gen. and Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Freddie Lee Williams appeals his conviction of first-degree murder and sentence of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm both the conviction and sentence.

The victim was Mary Robinson, Williams' longtime girlfriend. On the night of the murder, the victim went to her sister's house and there received a number of upsetting telephone calls from Williams. After these calls, the victim and her sister

went to jai alai and returned to the Williams-Robinson apartment around eleven o'clock. The sister left; Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were already present.

Earlier that evening, Williams had borrowed a neighbor's handgun, telling him that he was going gambling. He testified that he left the gun on the dresser in a bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. He called the police and an ambulance. He also testified he did not want the police to find the weapon in his possession since he was on parole; he thus went into the bedroom and took the pistol from the dresser and threw it outside under a bush.

The state's case revolved around long-standing domestic arguments between Williams and the victim and in particular Williams' anger over the victim's supposedly taking a shower that night, a sign he took to mean that the victim was cleaning up after being with a boyfriend.

After the conviction, the jury voted to recommend the death penalty. Upon finding two aggravating circumstances and nothing in mitigation, the trial court imposed a sentence of death.

Williams argues twelve issues on this appeal. We discuss only three; the remaining have been carefully considered and are found to be devoid of merit.

Williams first argues that the evidence is insufficient to support a verdict of first-degree murder. He asserts that the element that was not proved to the satisfaction of sufficiency of evidence standards was premeditation. He claims this is significant given the fact that there was no evidence of, nor did the prosecution argue, felony murder.

[1] The proper role that this Court plays in capital cases has been enunciated in *Tibbs v. State*, 397 So.2d 1120 (Fla.1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). There we said that

> an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.

397 So.2d at 1123 (footnotes omitted). *See also Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). It is our function, then, to see if there is substantial, competent evidence to support this verdict. We find there is.

[2] Resolving all conflicts in favor of the jury verdict, we find that the record is sufficient to find premeditation beyond a reasonable doubt. The jury was told that the telephone conversations between the victim and Williams were upsetting to the victim. There was evidence of a prior stormy relationship between the victim and Williams. And, most significantly, the jury was told that Williams borrowed a pistol that evening prior to the shooting and then complained to a friend that the victim was washing up after being with another man. We have stated elsewhere that

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of

> the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957). We think that under the facts of the instant case, there clearly was sufficient time before the killing for Williams to have formed a premeditated design, and the borrowing of the gun and the statements made by Williams about his anger at the victim cleaning up bear this out.

[3] This Court is not unmindful that "where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *McArthur v. State*, 351 So.2d 972, 976 n. 12 (Fla.1977). *See also Jaramillo v. State*, 417 So.2d 257 (Fla.1982). At trial, the sole theory of defense was that the crime was committed by an unknown assailant. According to Williams, the victim was already wounded when he entered the apartment and he claimed he tried to help her. The state established by ballistics tests that the pistol Williams had borrowed was the murder weapon. The physical evidence presented at trial shows that Williams' story about an unknown murderer as well as the circumstances surrounding the disposal of the gun is clearly unreasonable. Williams did not present any *reasonable* hypothesis of innocence. The jury could properly conclude that Williams was not telling the truth and, given the evidence, that Williams' act represented premeditated murder.

Defense counsel in closing argument suggested that the evidence showed, at most, second-degree murder and that this killing could have been a domestic heat-of-passion murder. The jury could properly find otherwise based on what the evidence did *not* show. There was no evidence of any struggle or commotion or any facts which might suggest a confrontation of any physical or violent nature between the victim and Williams. Given the location of the victim crouching on the corner of the bed when she was shot, the presence of toothpaste and a toothbrush on the bed, and the fact that the gunshot wound was not suffered at close range, the jury could have found that Williams confronted the victim while she was brushing her teeth causing her to move to the bedroom. He then shot her once in the side of the neck while her head was turned away from him and while her arm was raised in a defensive posture. The fact that the victim was only shot once is not dispositive of lack of premeditation since, in this case, the wound was in the neck region and immediately caused massive and visible loss of spurting blood. While it was within the province of the jury to find second-degree murder in this case, despite appellant's claim of innocence, we cannot say that the evidence, including the physical facts, is such that the jury was precluded, as a matter of law, from finding first-degree murder.

We hold, then, that the jury could properly find the element of premeditation in this murder and that there was both substantial and competent evidence to support this.

[4] Williams next argues that the trial court erred in refusing to give his instruction on circumstantial evidence. He relies on *McCall v. State*, 116 Fla. 179, 156 So. 325 (1934), *overruled, State v. Anderson*, 270 So.2d 353 (Fla.1972), *as stated in Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), *petition denied*, 412 So.2d 468 (Fla.1982); *Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933), *overruled, State v. Anderson*, 270 So.2d 353 (Fla.1972), *as stated in Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), *petition denied*, 412 So.2d 468 (Fla.1982); *Perez v. State*, 371 So.2d 714 (Fla. 2d DCA 1979); *Lee v. State*, 362 So.2d 692 (Fla. 4th DCA 1978); and *Newsome v. State*, 355 So.2d 483 (Fla. 2d DCA 1978), *disagreed with, Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), *petition denied*, 412 So.2d 468 (Fla.1982), for the proposition that an instruction on circumstantial evidence is required where the prosecution relies solely on circumstantial evidence to prove an essential element of the offense charged. We

agree, but we also find that those cases precede our recent opinion revising the standard jury instructions. *See In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594 (Fla.1981). There we explicitly stated that the circumstantial evidence instruction is now unnecessary because the instructions on reasonable doubt and burden of proof are sufficient to properly instruct the jury and a separate instruction solely on circumstantial evidence would be duplicative.

Williams argues that the standard jury instructions are flexible guidelines and not inflexible rules and that the trial court still should have given the "old" circumstantial evidence instruction since circumstantial evidence was so prominent in this case. We appreciated this possibility when we noted in our jury instruction revision opinion that "[t]he elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case." *Id.* at 595. In the case sub judice, the trial court in its discretion felt the extra instruction was unnecessary. We will not disturb the action of the lower court in the exercise of its judicial discretion unless palpable abuse of this discretion is clearly shown from the record. Williams has not shown the trial judge's action to be abusive of his discretion.

Williams' final point relates to the sentence of death. He argues that the death sentence is unwarranted when this case is compared to similar cases and especially to those cases where the sentence of death is overturned and a life sentence mandated. He also argues that the trial court erred by doubling the aggravating circumstances.

The trial court's findings of fact included the following:

> There are nine aggravating circumstances set out in Florida Statutes 921.-41(5) (sic).
>
> A review of the aggravating circumstances prescribed by statute shows that there are two aggravating circumstances present. These are Subsections (a) and (b) and are as follows:
>
> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or [of] a felony involving the use of (sic) threat or (sic) violence to the person.
>
> Regarding aggravating circumstance (a), the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted in this case. In Count Two of Orange County Case Number CR74–3442, the Defendant pled guilty to possession of a firearm by a convicted felon, and on June 6, 1975 was sentenced to 10 years imprisonment. That at the time the murder in this case was committed the Defendant was still on parole. A person on parole is still under sentence of imprisonment. *Aldridge v. State of Florida*, 351 So.2d 942.
>
> Regarding aggravating circumstance (b), the Defendant had been previously convicted of a felony involving the use or threat of violence to another. In Orange County Case Number 71–1551 the Defendant pled guilty to aggravated assault and was sentenced to 5 years imprisonment. In Count One of Orange County Case Number CR74–3442 the Defendant pled guilty to aggravated assault. In both of these aggravated assault cases Freddie Lee Williams shot his victims.
>
> The other aggravating circumstances prescribed by statute are not present.
>
> . . . .
>
> The Court has carefully considered the mitigating circumstances prescribed by Statute and finds none to be present.
>
> . . . .
>
> At the penalty phase trial the defendant presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstances.

[5, 6] Williams argues that it is a duty of this Court to make a proportionality de-

termination and decide how this case compares with other cases. We agree. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). "[W]e compare the case under review with all past capital cases to determine whether or not the punishment is too great." 392 So.2d at 1331. This we have done. We conclude that the sentence imposed here is not comparatively inappropriate and thus is proper.

Williams cites *Phippen v. State*, 389 So.2d 991 (Fla.1980); *Brown v. State*, 367 So.2d 616 (Fla.1979); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); and *Tedder v. State*, 322 So.2d 908 (Fla.1975), as decisions wherein this Court has reduced a death sentence to one of life imprisonment under circumstances seemingly more serious than those in the present case. These cases are not only factually inapposite, but each was a jury override, a situation where the trial judge pronounced a sentence of death after the jury by majority vote has recommended a life sentence. Factors and considerations were thus present in those cited cases that are absent in the one sub judice.

Likewise, Williams cites *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), as examples where this Court has reduced a sentence of death to one of life even after the jury recommended death. These cases are inapposite, however. In *Blair*, the trial judge improperly included several aggravating factors; since there was a mitigating factor, this Court vacated the death sentence. In *Kampff*, all of the trial court's findings of aggravating factors were found to be in error; since there were at least two mitigating factors, the sentence of death was improper. Finally, in *Halliwell*, the sole aggravating circumstance was found not to apply; the presence of numerous mitigating factors warranted the reduction of the sentence from death to life imprisonment. While all three of these cases involved a domestic dispute, as does the instant case, the rationale for the overturning of the death sentences in each was error in the aggravation/mitigation equation and not the fact of the domestic dispute. Since we hold, immediately below, that there was no error in the trial court's findings of the aggravating factors, Williams' proportionality argument fails.

[7, 8] Finally, Williams asserts that the trial court erred by doubling the aggravating circumstances. We disagree. The trial court properly found that Williams was under sentence of imprisonment because of the 1975 Orange County conviction and 10-year sentence. Williams was on parole at the time of this homicide; an actual incarceration is not necessary. *Aldridge v. State*, 351 So.2d 942 (Fla.1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). This is satisfactory proof of section 921.141(5)(a), Florida Statutes (1979). Similarly, section 921.141(5)(b) was proven by either the 1972 conviction for aggravated assault or by the 1975 aggravated assault conviction. There was no doubling of the aggravating circumstances in this case.

Appellant, Freddie Lee Williams, was properly convicted of first-degree murder. The jury recommended death. The trial court correctly found two aggravating circumstances and nothing in mitigation. We have compared this case to similar cases and have concluded the death sentence is appropriate. Therefore, the judgment of guilty of first-degree murder and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, McDONALD and EHRLICH, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I concur with the conviction. I dissent from the imposition of the death sentence. In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five years. I disagree with the majority opinion that this case is factually

inapposite from *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Phippen v. State*, 389 So.2d 991 (Fla.1980); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); *Brown v. State*, 367 So.2d 616 (Fla.1979); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); and *Tedder v. State*, 322 So.2d 908 (Fla.1975). Those cases must be used to properly evaluate the proportionality of the death sentence in this case.

John MICHAEL, Appellant,

v.

STATE of Florida, Appellee.

No. 60712.

Supreme Court of Florida.

July 14, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted before the Circuit Court in and for Pinellas County, B.J. Driver, J., of first-degree murder and was sentenced to death. The defendant appealed. The Supreme Court, held that: (1) where defendant, who was in custody at time, confessed to cell mates prior to first time any law enforcement agent talked with cell mates about investigation concerning defendant, defendant's incriminating statements to cell mates were admissible at trial; (2) evidence was sufficient to support conviction; (3) trial court did not err in admitting letter that defendant wrote to cell mate, to whom defendant had confessed murder, concerning his love and homosexual desires for cell mate in view of fact that defendant's homosexual preferences were already before jury and letter was relevant in determining voluntariness of defendant's confession to cell mate; (4) evidence was sufficient to support trial court's finding that aggravating factor that defendant committed murder in cold, calculated, and premeditated manner was proven beyond a reasonable doubt; and (5) evidence was sufficient to support finding that aggravating factor that murder was committed for pecuniary gain was proven beyond a reasonable doubt.

Affirmed.

1. Criminal Law ⇐641.12(1)

Where defendant, who was in custody after being indicted for first-degree murder, confessed to cell mates prior to first time any law enforcement agent talked with cell mates about investigation concerning defendant, defendant's incriminating statements to cell mates were admissible at trial.

2. Homicide ⇐253(1)

Evidence, including defendant's confessions to cell mates, was sufficient to sustain conviction of first-degree murder.

3. Searches and Seizures ⇐3.6(4)

Sufficient probable cause existed to support issuance of search warrant to search house trailer defendant shared with murder victim.

4. Searches and Seizures ⇐3.8(2)

Police searching house trailer shared by defendant and murder victim under authority of properly issued search warrant had authority to search contents of small box found in trailer for possible evidence of crime, so that discovery and use of will found inside box in subsequent prosecution for murder was proper.

5. Criminal Law ⇐433

In murder prosecution, trial court did not err in admitting letter that defendant wrote to cell mate, to whom defendant had confessed murder, concerning his love and homosexual desires for cell mate in view of fact that defendant's homosexual preferences were already before jury and letter was relevant in determining voluntariness of defendant's confession to cell mate.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL

No. _____ 83-6184

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, FREDDIE LEE WILLIAMS, by and through his undersigned counsel, asks leave of this Honorable Court to proceed in forma pauperis pursuant to Rule 46. Attached hereto is an affidavit from the Petitioner, who is presently incarcerated at Florida State Penitentiary, Starke, Florida.

CHANDLER R. MULLER
Muller, Kirkconnell and
Lindsey, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (305) 645-3000

Attorney for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

83-6184

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, FREDDIE LEE WILLIAMS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

A. Whether the failure of the Florida Supreme Court to consider non-statutory but judicially recognized mitigating circumstances when conducting a proportionality review of the applicability of a death sentence constitutes excessive and disproportion of punishment forbidden by the Eighth and Fourteenth Amendments, and constitutes an equal protection violation under the Fourteenth Amendment.

B. Whether the Florida Supreme Court failed to perform a constitutionally adequate proportionality review since Petitioner's case was factually inapposite from

several other Florida Supreme Court cases where it was held that the death penalty would constitute excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

C. Whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and his prior conviction as two (2) separate aggravating circumstances constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. I cannot remember but it has been several years since I was last employed.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding

ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None presently.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

FREDDIE LEE WILLIAMS

SUBSCRIBED AND SWORN TO
before me this ____ day
of February, 1984.

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUDGE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

83-6184

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF ORANGE

CHANDLER R. MULLER, being duly sworn, states:

1. I am an attorney for FREDDIE LEE WILLIAMS, the Petitioner in the above-captioned action, and I make this affidavit in support of Mr. Williams' motion for leave to proceed in forma pauperis. My representation of Mr. Williams is without remuneration.

2. An in forma pauperis affidavit signed by Mr. Williams is attached hereto.

3. Counsel was appointed to represent Mr. Williams at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Williams in unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Williams in entitled to redress in this action.

Chandler R. Muller

CHANDLER R. MULLER

Sworn to before me this
____ day of January, 1984.

NOTARY PUBLIC
State of Florida at Large
My Commission Expires: